2007

Ray Hunting v. Pipe Renewal Service, LLC : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RAY HUNTING, Plaintiff/Appellee and Cross-Appellant, vs. PIPE RENEWAL SERVICE, LLC, a Limited Liability Company, Defendant/Appellant and Cross-Appellee.	Appellate Case No. 20070657-CA Trial Court No. 050800484

BRIEF OF APPELLEE AND CROSS-APPELLANT RAY HUNTING

APPEAL FROM THE 8TH JUDICIAL DISTRICT COURT
HONORABLE JOHN R. ANDERSON

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ORAL ARGUMENT REQUESTED

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I

STATEMENT SHOWING JURISDICTION OF THE COURT

In Utah Code Annotated § 78-2-2(3)(j) (2001), § 78-2-2(4) (2001), and § 78-2a-3(2)(j) (2001), the Utah Legislature conferred appellate jurisdiction upon the Utah Court of Appeals to review any appeal resulting from the final order of any Court of record which is transferred to the Court of Appeals from the Supreme Court. This case involves the timely appeal by Defendant Pipe Renewal Service, LLC (herein "PRS LLC") and the timely Cross-Appeal by Plaintiff Ray Hunting (herein "Ray") from that final order styled, "Judgment and Final Order" (herein the "Final Order") which was issued on August 6, 2007, by the Honorable John R. Anderson, Eighth Judicial District Court Judge.

II

A. RE-STATEMENT OF THE ISSUES OF APPELLANT PRS LLC

Pursuant to Rule 24(b)(1) of the Utah Rules of Appellate Procedure, Ray respectfully disagrees with PRS LLC's statement of the issues and the standards of review identified by PRS LLC and therefore restates the issues and provides the appropriate standards of review as follows:

1. In light of the Utah Supreme Court's decision in Holmes Development, LLC v. Cook, 48 P.3d 895 (Utah 2002), can PRS LLC claim to be a party to an alleged lease agreement that does not facially identify PRS LLC as a party and thereby require Ray to name that third party under principles involving joinder of parties?

Standard of Review: Since this issue was raised for the first time on appeal, the "standard of review" on this issue is correction of error because there is no decision

below to give deference. Had the joinder issue been raised below, the standard of review on this issue would be abuse of discretion. See, Green v. Louder, 2001 UT 62, ¶ 40, 29 P 3d 638.

2. Did the Trial Court properly exercise its discretion by denying PRS LLC's Motion to Reconsider entry of Partial Summary Judgment in Ray's favor?

Standard of Review: This standard of review on this issue is abuse of discretion. A Trial Court's decision to grant or deny a motion to reconsider summary judgment is within the sound discretion of the Trial Court. Timm v. Dewsnup, 921 P.2d 1381, 1386-7 (Utah 1996); Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1312 (Utah Ct.App. 1994).

3. Did the Trial Court properly award Ray damages in the form of lost rent under Utah Code Ann. § 78-36-10 (1994)?

Standard of Review: The standard of review on this issue is correction of error with no deference to the Trial Court's decision because it involves an issue of statutory construction. See, Aris Vision Institute, Inc. v. Wasatch Property Management, Inc., 2006 UT 45, ¶ 7, 143 P.3d 278.

B. STATEMENT OF THE ISSUES OF CROSS-APPELLANT RAY HUNTING

1. Did the Trial Court err when it refused to treble the damages awarded to Ray as required by the Unlawful Detainer Statute set forth in Utah Code Ann. § 78-36-10 (1994)? This issue was preserved below at R. 139-40; R. 161-62; R. 636-638; R. 640-644.

Standard of Review: The standard of review on this issue is correction of error with no deference to the Trial Court's decision because it involves an issue of statutory construction. Lysenko v. Sawaya, 2000 UT 58, ¶23. 7 P.3d 783; Fowler v. Seiter, 838 P.2d 675, 677 (Utah Ct.App. 1992).

2. Did the Trial Court err by repeatedly declining to grant Ray's Motion for Summary Judgment on the issue of general damages where PRS LLC failed to properly dispute/contest the accuracy/amount of Ray's general damage claim? This issue was preserved below at R. 139-40; R. 161-62; R. 302-320; R. 559-561; R. 578.

Standard of Review: The standard of review on this issue is correction of error with no deference to the Trial Court's decision because it involves a legal issue. Bluffdale City v. Smith, 2007 UT App 25, 156 P.3d 175; Estate Landscape and Snow Removal v. Mountain States Telephone and Telegraph Co., 844 P.2d 322 (Utah 1992).

III

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUES, AND RULES

Pursuant to Rules 24(a)(6) and 24(a)(11) of the Utah Rules of Appellate Procedure, Ray has concurrently submitted an Addendum that contains the following applicable constitutional provisions, statutes, and rules, to-wit:

1. Determinative Statutory Provisions:

   A. The Unlawful Detainer Statute including the following/pertinent provisions;

   (i) Utah Code Ann. § 78-36-3(1) (1992)
   (ii) Utah Code Ann. § 78-36-6 (1997) & (2007)
   (iii) Utah Code Ann. § 78-36-7 (1992)
   (iv) Utah Code Ann. § 78-36-8.5 (1987)
   (v) Utah Code Ann. § 78-36-10 (1994) & (2007)
   (vii) Utah Code Ann. § 78-36-12.3 (1981)

The foregoing statutory provisions are attached as Exhibit A & B to the Addendum.

2. The pertinent rules are as follows:

   A. Rule 7 Ut.R.Civ.P.
   B. Rule 8 Ut.R.Civ.P.
   C. Rule 12 Ut.R.Civ.P.
   D. Rule 19 Ut.R.Civ.P.
   E. Rule 20 Ut.R.Civ.P.
   F. Rule 54 Ut.R.Civ.P.
   G. Rule 56 Ut.R.Civ.P.
   H. Rule 24 Ut.R.App.P.

The foregoing rules are attached as Exhibit C to the Addendum.

IV

STATEMENT OF THE CASE

A. Case Nature, Course, Proceedings and Disposition

1. Nature of the Case: Ray is the landlord of certain real property located at 5500 East 5750 South, Vernal, Utah (herein "the Property"). R. 72; R.167. Prior to August 15, 2005, Pipe Renewal Service, LLC (herein "PRS LLC") occupied and rented the Property from Ray on a month-to-month basis and paid monthly rent in the sum of $2,000.00. R. 168-179. On August 15, 2005, Ray caused a written notice to be served upon the registered agent of PRS LLC, William L. Lauf, wherein Ray timely notified PRS LLC that its monthly rent would increase to the sum of $7,500.00, effective September 1, 2005 (herein the "Rent Increase Notice"). R. 165; R. 167. Despite its receipt of the Rent Increase Notice, PRS LLC only paid $2,000.00 in rent each month for the months of September of 2005 through December of 2006 and did not comply with the Rent Increase Notice. R. 156; R. 165; R. 178.

Prior to August 1, 2005, Ray had not received any rent payments or notice from any other person or entity in which said person or entity asserted any right/claim to rent or lease the Property. R. 156; R. 178. No other person or entity other than PRS LLC paid rent to Ray for the possession, occupancy and/or use of the Property commencing with August of 2005 through December of 2006. R. 156; R. 178; R. 625-628. No other person, or entity under the control of PRS LLC sought to intervene in the litigation below for the purpose of claiming any tenancy, interest, or right(s) to the Property. R. 165-166;

R. 178.

On September 16, 2005, Ray caused a "Three Day Notice to Pay Rent or Vacate" (herein the "Three Day Notice") to be served upon Mr. Lauf as registered agent for PRS LLC as a result of its failure/refusal to pay the increased rent specified in the Rent Increase Notice. R. 165; R. 177. Ray filed the lawsuit below as an action for unlawful detainer seeking an order of restitution and award of unpaid increased rent and treble damages. R. 59-69.

2. Course of the Proceedings Below: On September 21, 2006, Ray filed his Motion for Summary Judgment (herein "Ray's SJ Motion") supported by the Affidavit of Ray Hunting dated September 19, 2006 (herein "Ray's SJ Affidavit"). R. 138-140; R. 168-179. On September 22, 2006, PRS LLC filed its Motion to Dismiss. R. 180-181. On November 1, 2006, the Honorable John R. Anderson, in the Eighth Judicial District Court, entered his Ruling and Order granting, in part, Ray's Motion for Summary Judgment (herein "SJ Ruling"), finding PRS LLC in unlawful detainer of the Property and denying PRS LLC's Motion to Dismiss.[1] In Judge Anderson's SJ Ruling, he reserved the amount of Ray's damages for further hearing. R. 340-343; R. 840-843.

On November 7, 2006, Judge Anderson issued Ray's Order of Restitution ordering PRS LLC to vacate the premises within ten (10) days after service. R. 364-365. On

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1. At page 4 of PRS LLC's Brief it claims that the Trial Court treated its Motion to Dismiss as a Motion for Summary Judgment. PRS LLC's assertion is erroneous because under Rule 12(b) Ut.R.Civ.P., the Trial Court properly "exclude[ed] the lease agreement, and...treat[ed] the motion as a motion to dismiss." R. 341.

November 9, 2006, Judge Anderson issued an Order striking the Ray's Order of Restitution based on Rule 7(f)(2) of the Utah Rules of Civil Procedure. R. 353. On November 14, 2006, PRS LLC filed its Motion to Reconsider which was accompanied by a supporting Memorandum and Affidavit. R. 369-388. Counsel for Ray subsequently re-served Ray's Order of Restitution and submitted it to Judge Anderson for consideration on December 21, 2006, after PRS LLC filed an objection on November 30, 2007. R. 584-588. On January 8, 2007, Judge Anderson issued a Ruling advising the parties to be prepared to address Ray's Order of Restitution at oral argument, which Oral Argument was scheduled for January 30, 2007. R. 594-598. At the conclusion of oral argument, Judge Anderson issued his ruling from the bench granting Ray's Order of Restitution as to PRS LLC and providing the parties fifteen (15) days in which to present evidence to the Court in the form of an appraisal of the Property regarding the amount of a bond upon which it would be willing to stay the Order of Restitution. R. 872 at p. 33-38. The following day, in the Court's Ruling and Order dated February 1, 2007, the Court sua sponte amended its ruling from the bench and declined to enter Ray's Order of Restitution as to PRS LLC. R. 594-599.

In Judge Anderson's February 1, 2007, Ruling and Order (herein "Reconsideration Ruling"), the Trial Court denied Defendant's Motion for Reconsideration and affirmed its prior SJ Ruling. R. 598-599. Again, Judge Anderson reserved the amount of damages to be determined at a future hearing. R. 595.

Pursuant to the Court's Reconsideration Ruling, Ray submitted his Motion to

Award Damages and For Entry of Final Judgment on May 2, 2007 (herein "Ray's Damages Motion"), which was supported by the Affidavits of Ray Hunting, his counsel Phillip W. Dyer, and Paul W. Throndsen, MAI. R. 600-709 [sic].[2] In the MAI appraisal conducted by Mr. Throndsen, he opined that the current fair market rental value of the Property to be $13,450.00 per month and the fair market value of the Property to be $1.600,000.00. R. 707. Although PRS LLC attempted to discredit Mr. Throndsen's appraisal, it did not present any expert opinion in opposition thereto. R. 741-768. In Judge Anderson's Ruling dated July 2, 2007, he awarded Ray his damages for the difference between the $2,000.00 in monthly rent paid by PRS LLC, and the $7,500.00 per month in rent specified in the Rent Increase Notice, but did not award Ray any treble damages under Utah Code Ann. § 78-36-10 (1994). R. 817-822; R. 840-843.

3. Disposition Below: The Honorable John R. Anderson awarded Ray damages in his favor and against PRS LLC in the form of unpaid increased rent totaling $88,000.00, and costs of $174.50 but did not award Ray treble damages under Utah Code Ann. § 78-36-10 (1994). R. 840-843.

B. Statement of Facts.

(i) The uncontested facts as set forth in Ray's SJ Motion, which were deemed admitted pursuant to Rule 7(c)(3) of the Utah Rules of Civil Procedure (R. 342-343):

1. Ray is the Landlord of certain real property located at 5500 East 5750

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2. There appears to be a clerical error in the page numbering of the record. The pages numbered 700 through 749 are duplicated in the record.

South, Vernal, Utah (herein "the Property"), which real property is located in Uintah County, State of Utah. This fact is admitted in PRS LLC's Answer to Amended Complaint for Eviction dated June 30, 2006 (herein "PRS LLC's Answer") at paragraph 2. R. 72; R. 167.

2. Prior to August 16, 2005, PRS LLC occupied and rented the Property from Ray on a month-to-month basis and paid monthly rent in the sum of $2,000.00. See, Affidavit of Ray Hunting dated September 19, 2006 (herein "Ray's SJ Affidavit") at ¶ 3. R. 166; R. 168-179.

3. On August 16, 2005, Ray caused a written notice to be served upon the registered agent of PRS LLC, William L. Lauf, in which Ray timely notified PRS LLC that PRS LLC's monthly rent would increase to the sum of $7,500.00, effective with the monthly rent due on September 1, 2005. Said notice specifically identified that it was regarding "Notice of Rent Increase Effective September 1, 2005." (herein the "Rent Increase Notice"). A true and correct copy of the Rent Increase Notice is attached to Ray's SJ Affidavit as Exhibit A. See, Ray's SJ Affidavit at ¶ 4. R. 166; R. 168-179.

4. Prior to August 1, 2005, Ray did not receive any notice from any other person or entity in which said person or entity has asserted any right/claim to rent or lease the Property. See, Ray's SJ Affidavit at ¶ 5. R. 166; R. 178.

5. No other person or entity other than PRS LLC paid rent to Ray for the possession, occupancy and/or use of the Property commencing with August of 2005 through the date of Ray's SJ Affidavit. R.156; R. 166; R. 178. See, Ray's SJ Affidavit at

¶ 6; Deposition of William Lauf dated July 31, 2006 (herein "Lauf Deposition") at page 77 and Exhibit 3 thereto. No other person or entity under the control of PRS LLC or Mr. Lauf sought to intervene in the lawsuit below for the purpose of claiming any tenancy or interest in the Property. R. 165-166; R. 178.

6. Despite its receipt of the Rent Increase Notice, PRS LLC only paid $2,000.00 in rent each month for the months of September of 2005 through September of 2006 and did not comply with the Rent Increase Notice. See, Ray's SJ Affidavit at ¶ 7; See, Lauf Deposition at Exhibit 3 thereto. R. 156; R. 165; R. 178.

7. On or about September 16, 2005, Ray caused a "Three Day Notice to Pay Rent or Vacate" (herein the "Three Day Notice") to be served upon William L. Lauf as registered agent for PRS LLC due to PRS LLC's failure/refusal to pay the increased rent specified in the Rent Increase Notice. See, Ray's SJ Affidavit at ¶ 8 and Exhibit B. R. 165; R. 177.

8. PRS LLC did not comply with the Three Day Notice by paying the sums due and owing as stated therein or by vacating the Property [prior to December 31, 2006]. PRS LLC was in unlawful detainer of the Property [at the time the Court granted Ray's SJ Motion] by retaining possession and use of the Property without payment of the increased monthly rent due and owing after September 1, 2005. See, Ray's SJ Affidavit at ¶ 9. R. 165; R. 177.

9. As of the filing of Ray's SJ Motion, PRS LLC was indebted to Ray in the

sum of $71,500.00,[3] which represented accrued and unpaid increased monthly rent for the months of September of 2005. through September of 2006, totaling $97,500.00 less the sum of $26,000.00 previously paid by Defendant. See, Ray's SJ Affidavit at ¶ 10. R. 165; R. 176-177.

(ii) The following additional facts were presented to the Trial Court in Ray's Damages Motion and were unopposed by PRS LLC below:

10. On November 1. 2006. the Trial Court entered its SJ Ruling granting Ray's SJ Motion, determining that PRS LLC was in unlawful detainer of the Property. R. 340-343; R. 646. The Court reserved the amount of damages for further hearing as follows:

> "Because the Court finds that the Plaintiff is entitled to increase rent, and because the Defendant [PRS LLC] concedes receiving notice of the rent increase and failing to pay the increased amount, and because the Plaintiff served the Defendant with a notice to vacate, and because the Defendant did not pay the increased rent and did not vacate, the Court can lawfully conclude that the Defendant is in unlawful detainer of the subject property. Therefore, the Court will grant Plaintiff's Motion for summary judgment. However, the Court is concerned with the amount of damages as calculated by the Plaintiff. Therefore, the Court will order that a hearing be held on the issue of damages." SJ Ruling dated November 1, 2006 at page 2-3 (emphasis supplied). R. 340-343; R. 646.

11. On February 1, 2007, the Trial Court entered its Reconsideration Ruling denying Defendant's Motion for Reconsideration and upholding its prior SJ Ruling granting Ray's SJ Motion. R. 594-599; R. 645. Again, the Court reserved the amount of

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3. As a result of PRS LLC's attempts to delay entry of judgment, the final unpaid rent figure increased to $88,000.00. R. 817-822; R. 840-843. See, Ray's Argument 1A hereinbelow at p. 38-39 for a full explanation.

damages to be determined at a future hearing as follows:

> "Therefore, the Court concludes as follows. The rights of PRS, LLC have been adjudicated, the Court finding that PRS, LLC was lawfully served with an increase in rent. Failing to pay the increase in rent, the Plaintiff brought suit against the LLC for unlawful detainer. The Court's order granting Plaintiff's motion for summary judgment effectively adjudicated the rights of the Plaintiff against the LLC. ...
>
> Finally, the issue of Plaintiff's damages resulting from PRS, LLC's unlawful detainer will be reserved for future hearing." Reconsideration Ruling dated February 1, 2007, at pages 4-5 (emphasis supplied). R. 594-599; R. 645.

12. During the January 30, 2007, oral argument in this matter, the Court expressed concern regarding the amount of damages in this matter and suggested that the parties obtain real estate appraisals to assist the Court in determining the amount of a possession bond (now moot)[4] as well as the fair market rental value of the Property in question. R. 872 at p. 33-38. Accordingly, Ray arranged to have an appraisal of the Property performed by Paul W. Throndsen, MAI. In the MAI appraisal conducted by Mr. Throndsen, he valued the then current fair market rental value of the Property to be $13,450.00 per month and the fair market value of the property to be $1,600,000.00. See, Affidavit of Mr. Throndsen dated April 30, 2007, and the Appraisal Report attached as Exhibit B thereto. R. 600-709; R. 644-645.

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4. As a matter of caution, Ray's counsel raised a third issue regarding the denial of Ray's Writ of Restitution in its Docketing Statement. However, the issue is now moot because PRS LLC has vacated the Property and Ray hereby withdraws that argument.

IV

A. SUMMARY OF ARGUMENT ON APPELLANT PRS LLC'S APPEAL

POINT I: The Trial Court properly granted Ray's SJ Motion against Defendant PRS LLC under Utah Code Ann. § 78-36-7 (1992) and Holmes Development, LLC v. Cook, 2002 UT 38, ¶53, 48 P.3d 895, because PRS Corporation[5] was not a necessary and indispensable party. Furthermore, Defendant PRS LLC failed to present any competent evidence that PRS Corporation was in actual possession of the Property at the time of the commencement of the unlawful detainer action as required by Utah Code Ann. § 78-36-7 (1992).

POINT II: PRS LLC failed to present or raise any genuine issue of material fact in opposition to Ray's SJ Motion, which Motion was properly supported by Ray's SJ Affidavit dated September 19, 2006, and portions of the Lauf deposition dated July 31, 2006, and was unopposed by PRS LLC. The alleged lease agreement between Ray and a third party, PRS Corporation, is insufficient as a matter of law to create a genuine issue of material fact because it was irrelevant to the dispute between the parties litigant. The Trial Court properly exercised its discretion under Rule 54(b) to deny PRS LLC's Motion for Reconsideration despite the tardy Affidavit of William Lauf dated November 14, 2006.

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5. The alleged lease agreement is between Ray and a third party, Pipe Renewal Service Inc. (herein "PRS Corporation").

POINT III: In the Unlawful Detainer Statute at Utah Code Ann. § 78-36-10 (1994), the Utah Legislature has mandated the assessment of damages in the amount of rent due where the unlawful detainer is after default in the payment in rent. It is undisputed that PRS LLC was in unlawful detainer of the Property. Based on the plain language of the Unlawful Detainer Statute, damages in the form of unpaid rent are appropriate and statutorily required.

B. SUMMARY OF ARGUMENT ON CROSS-APPELLANT RAY HUNTING'S APPEAL

POINT I: The Trial Court erred by refusing to treble the damages awarded to Hunting under the Unlawful Detainer Statute. Our Utah Legislature in Utah Code Ann. § 78-36-10(3)(1994) has mandated treble damages in an unlawful detainer action. The Trial Court erroneously refused to treble Ray's damages on the ground that there may possibly be a third party in possession of the premises. The Trial Court's reasoning is in error because the unlawful detainer statute mandates trebled damages where the party appearing in the proceeding is found to be in unlawful detainer of the premises.

POINT II: The Trial Court erred by twice reserving the issue of damages when it granted Ray's SJ Motion determining PRS LLC was in unlawful detainer of the Property because PRS LLC did not dispute or present any competent evidence to factually dispute Ray's claims for damages.

ARGUMENT ON APPELLANT PRS LLC'S APPEAL

I
PRS LLC'S JOINDER ARGUMENT FAILS AS A MATTER OF LAW.

A. In Utah Code Ann. § 78-36-7 (1992), the Legislature has statutorily precluded the dismissal of an unlawful detainer action for an alleged failure to join a necessary party defendant.

Although PRS LLC maintains that it raised the issue of failure to join an indispensable party below, PRS LLC raised the issue for the first time on appeal.[6] Despite PRS LLC's failure to preserve the issue below, its failure is not fatal because this Court has previously held that the indispensable party issue can be raised for the first time

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6. None of the four (4) citations to the record in PRS LLC's Brief at page 1, demonstrate that it preserved the joinder issue for appeal, specifically raise the issue, and/or that the issue was supported with evidence or relevant legal authority. See, Hatch v. Davis, 2004 UT App 378 ¶56, 102 P.3d 774. PRS LLC's first citation to R. 377 is page 2 from the Affidavit of William Lauf in Support of [PRS LLC's] Motion to Reconsider dated November 14, 2006. Mr. Lauf's Affidavit did not raise the joinder issue and even, assuming arguendo, it did the Utah Court of Appeals has previously noted in State v. Phathammavong, 860 P.2d 1001, 1003, fn. 5 (Utah Ct.App. 1993), that it is improper to raise legal arguments in an affidavit.

PRS LLC's second citation to R. 481-482, is Exhibit A to PRS LLC's Reply Memorandum in Support of its Motion to Reconsider. However, nowhere in PRS LLC's Reply Memorandum in Support of its Motion to Reconsider does it even discuss the joinder issue. PRS LLC's third citation to R. 577-580, is Judge Anderson's January 8, 2007, Ruling and is therefore legally insufficient to meet PRS LLC's obligation to raise an issue. Finally, PRS LLC cites to R. 715-717, which is a portion of PRS LLC's Reply Memorandum in Support of its belated Motion for Summary Judgment [regarding the award of damages] that was submitted over six (6) months after the SJ Ruling. This Court has repeatedly held that issues raised for the first time in reply memoranda are not properly before the Court. See, State v. Phathammavong at 1004; Coleman v. Stevens, 2000 UT 98, ¶9, 17 P.3d 1122 (refusing to consider matters raised for the first time in a reply brief and holding that issues were deemed waived).

on appeal. See, Cassidy v. Salt Lake County Civil Service Council, 1999 UT App 65, ¶9, 976 P.2d 607.

In Utah Code Ann. § 78-36-7 (1992), our Utah Legislature provided that:

> "**78-36-7. Necessary parties defendant.**
> (1) No person other than the tenant of the premises, and subtenant if there is one in the actual occupation of the premises when the action is commenced,[7] shall be made a party defendant in the proceeding, except as provided in Section 78-38-13, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process of appearing in the proceedings are guilty, judgment shall be rendered against those parties." (1992)[8] (Emphasis supplied).

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7. PRS LLC has not pointed this Court to one shred of competent record evidence that PRS Corporation was in "actual occupation of the premises when the action [was] commenced." It is undisputed that PRS LLC is the only entity that paid rent to Ray for over two (2) years prior to the commencement of this action and was therefore the tenant of the Property. R. 156; R. 165-166; R. 178. Ray properly served A Rent Increase Notice and a subsequent Three Day Notice on PRS LLC. R. 165; R. 177. Neither PRS LLC nor any other person or entity responded to the Three Day Notice prior to the filing of this lawsuit. R. 165; R. 177. Had PRS Corporation been in actual occupation of the Property, it could and should have notified Ray of the same and taken any necessary steps to preserve its rights, if any, by seeking to intervene in the proceedings below.

8. In 2007, the Utah Legislature amended § 78-36-7 to include a requirement that a "lease signer" be made a party defendant in unlawful detainer proceedings as follows:

> "**78-36-7. Necessary parties defendant.**
> No person other than the tenant of the premises, a lease signer, and subtenant if there is one in the actual occupation of the premises when the action is commenced, shall be made a party defendant in the proceeding, except as provided in Section 78-38-13, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made a party defendant; but when it appears that any of the parties served with process or apprearing in the proceedings are guilty, judgment shall be rendered against those parties." Utah Code Ann. § 78-36-7 (2007) (2007 changes identified by underlining)

PRS LLC, not PRS Corporation, has at all times relevant herein paid the only (partial) rent that Ray has received during the proceedings below. R. 243 at ¶5; R. 62 at ¶7. In the absence of a written lease to the Property[9] between Ray and PRS LLC, PRS LLC's tenancy constitutes a month-to-month tenancy under the statute of frauds.[10] When

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The 2007 amendment to the Unlawful Detainer statute is inapplicable to this action because this action was filed in 2005 and substantive statutory amendments are not retroactively effective. See, Thomas v. Color Country Management, 2004 UT 12, ¶36, 84 P.3d 1201 (stating (1) the presumption in Utah that legislative amendments are substantive changes, and (2) the general rule against retroactive application of statutes in Utah). Assuming, arguendo, the 2007 amendment applied, PRS Corporation would still not be a necessary party defendant because the tenancy that was sued on was a month-to-month arrangement between Ray and PRS LLC and not the alleged written lease with PRS Corporation.

9. PRS LLC does not argue in its Brief that it is an assignee of the alleged written lease nor that it was a subtenant of PRS Corporation. An agreement to lease real property for more than one (1) year is subject to the statute of frauds and must be in writing. See, Utah Code Ann. § 25-5-3 (1953). Further, the statute of frauds prohibits an oral assignment of a lease for a term of more than one (1) year. See, Utah Mercur Gold Mining Co. v. Herschel Gold Mining Co., 134 P.2d 1094 (Utah 1943) (holding oral agreement to extend lease is subject to the statute of frauds). Thus, PRS LLC is not entitled to the benefit of any alleged written lease between Ray and PRS Corporation in the absence of a written agreement effecting an assignment of the same – more importantly, no such assignment exists nor was one proffered or contained in the record of the proceedings below.

10. The statue of frauds clearly provides that an agreement to lease real property, in excess of one (1) year, is void if it is not written and signed:

> "§ 25-5-3. Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing." (1953)

PRS LLC failed to pay increased rent when due (R. 165; R. 177). Ray properly complied with the terms of the Unlawful Detainer statute (R.165; R. 177; R. 340-343). and the Trial Court properly entered judgment against PRS LLC and in Ray's favor (R. 340-343).

In opposition to Ray's SJ Motion, PRS LLC argued that it was entitled to the rights and benefits of the alleged written lease with a third party, PRS Corporation. R. 275; R. 276; R. 278. However, the Trial Court properly ruled that the alleged written lease with a third party, PRS Corporation, was not relevant to the unlawful detainer action herein because PRS LLC is not a party to the alleged written lease and does not have standing to enforce the same because PRS LLC is a separate legal entity from PRS Corporation. Thus, unless a party is an identified third party beneficiary to a lease/contract, the Utah Supreme Court has clearly held that separate legal entities are not bound by, or entitled to the benefit of, the contractual obligations/rights of another. [11] Accordingly, a breach of contract claim can only be maintained as between the parties to that contract. See, Holmes Development, LLC v. Cook, 2002 UT 38, ¶ 53, 48 P.3d 895. PRS LLC, thus has no standing to assert the alleged written lease with PRS Corporation as a defense to Ray's Amended Complaint.

Further, where there is no valid written lease, the Utah Supreme Court has held the tenancy to be on a month-to-month basis. See, Greenwood v. Jackson, 128 P.2d 282 (Utah 1942) (holding lease that was void in contravention of the statute of frauds created a month-to-month tenancy).

11. PRS LLC attempted to confuse this issue by repeatedly referring in its memoranda below to "Pipe Renewal Service" and failing to distinguish between PRS LLC and the third party PRS Corporation.

In Holmes Development, LLC, Plaintiff Holmes Development, LLC, sued on a contract between Holmes Ventures, LC and Cook Development. The trial court granted the defendant's motion for summary judgment against the plaintiff Holmes Development, LLC, because the lawsuit was predicated on a contract between the defendant and a separate limited liability company - Holmes Ventures, LC. The Utah Supreme Court upheld the trial court's dismissal reasoning that although a related entity, Holmes Ventures, LC, was facially identified as the party to the contract, Holmes Development, LLC could not maintain an action for breach because only the parties to the contract can sue (and be sued) under the contract in dispute. As Justice Russon noted in the Court's unanimous decision:

> "Generally, unless a plaintiff can recover on a contract as a third-party beneficiary or an assignee, only parties to a contract can bring suit under the contract. *See SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶ 10, 28 P.3d 669; *Harper v. Great Salt Lake Council, Inc.*, 1999 UT 34, ¶ 20, 976 P.2d 1213; *M.H. Walker Realty Co. v. Am. Sur. Co.*, 60 Utah 435, 450, 211 P. 998, 1004 (1922). Holmes was not specifically a party to either the indemnity agreement or the modification and extension agreement. Holmes Ventures, LC, *not Holmes Development, LLC*, [FN6] was the party to both of these agreements. Assuming Cook and Cook Development were liable under the indemnity agreement and the modification and extension agreement, Holmes would not be able to sue to recover. *See* Utah Code Ann. § 48-2c-110(1) (Supp.2001) (Providing that limited liability company can "institute . . .any action . . .in its *own* name" (emphasis added)). Therefore, Holmes cannot pursue these claims against Cook or Cook Development.
>
> FN6. It may be that Holmes Development, LLC, and Holmes Ventures, LC, have the same management and may be practically indistinguishable. However, the two are legally

> separate entities and were created as separate entities for a purpose. *See* Utah Code Ann. § 48-2c-402 (Supp.2001). Therefore, we refuse to recognize them as the same entity for standing to sue on a contract." Holmes Development, LLC v. Cook, 2002 UT 38, ¶53, 48 P.3d 895 (Emphasis supplied).

On the face of the alleged written lease, PRS Corporation, not PRS LLC, is a party to that alleged written lease. PRS LLC, like Holmes Development, LLC, is thus not a party to the alleged written lease and thus lacks standing to assert any rights under the same. Significantly, PRS Corporation, did not file a motion to intervene in this action below,[12] presumably because it has abandoned[13] the alleged lease and/or had no legally

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12. The fatal flaw to the PRS LLC's argument is that PRS Corporation did not make any rental payments for over two (2) years and thus abandoned the alleged lease, and would therefore be unable to assert any rights under the alleged lease in any event. This is particularly true in light of the fact that PRS Corporation had knowledge of the unlawful detainer action but did not make any efforts to intervene. See, In Re Discipline of Alex, 2004 UT 81, ¶ 27-28, 99 P.3d 865, 870 (holding a landlord with a contingent interest in attorney/tenant's property is permitted under rule 24 Ut.R.Civ.P. upon timely application to intervene in an action – including a disciplinary action). PRS Corporation's registered agent is William L. Lauf, the same registered agent of PRS LLC. R. 378. If PRS Corporation desired to seek leave from the Trial Court to be joined as a party under Rule 20 of Utah Rules of Civil Procedure, it should have done so. In fact, during the January 30, 2007, hearing Judge Anderson invited PRS LLC's counsel to have PRS Corporation intervene as a party, to wit:

> "3 Mr. Sam: Your Honor, I sill have a question with
> 4 respect to Pipe Renewal Management Inc.'s interest here. Your
> 5 Honor did order that he be joined as a party. If the order that
> 6 the incorporation filed its pleading – I'm a little confused as
> 7 to what should happen there.
> 8 Mr. Dyer: Your Honor, I didn't read the court's ruling
> 9 as to saying that. It said the court was prepared to, but I
> 10 don't know that the court has.
> 11 The Court: I didn't order them to be joined, but I
> 12 thought it would be a good idea. But that's up to you, Mr. Sam.
> 13 Mr. Sam: Okay.

enforceable interest in the lease or the Property.[14]

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14 The Court: You may want – you know – you may not want
15 to. You may want to file a new case. I don't know. I'm not
16 going to tell you what to do.
17 Mr. Sam: I'll talk to Mr. Lauf
18 The Court: Okay. Thank you.
19 Mr. Sam: Thank you.
20 Mr. Dyer: May we be excused?
21 The Court: You may.
22 Mr. Dyer: Thank you.
23
24 (Whereupon another matter was heard.)" R. 871 at p.40. (Emphasis supplied)

PRS Corporation did not move to intervene in the proceedings below.

13. The Forcible Entry and Detainer Act provides that abandonment is statutorily presumed where:

> "(3) "Abandonment" is presumed in either of the following situations:
> (a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or
>
> (b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises." U.C.A. §78-36-12.3 (1981).

There was no evidence before the Trial Court below that PRS Corporation paid rent when due. Thus, there appears to be a presumption that PRS Corporation had abandoned the alleged lease agreement.

14. An agreement to lease real property for more than one (1) year is subject to the statute of frauds and must be in writing. See, fn. 10 at p. 17-18 hereinabove. Further, the statute of frauds prohibits an oral assignment of a lease for a term of more than one (1) year. See, Utah Mercur Gold Mining Co. v. Herschel Gold Mining Co., 134 P.2d 1094

Firstly, PRS LLC cites the case of Bonneville Tower Condominium Management Committee v. Thompson Michie Assos. Inc., 728 P.2d 1017 (Utah 1986) in support of its joinder argument. Bonneville is, however, easily distinguishable from the case at bar because it does not involve an unlawful detainer action but, rather, involved a dispute between condominium owners and the developer regarding common areas in the development. In Bonneville, the Court dismissed the action for failure to join the purchasers/owners of the common areas as necessary parties to the action. Given PRS LLC's subsequent vacating of the premises (R. 664; R. 821), Ray did not ultimately ask the Court to adjudicate the rights of PRS Corporation but simply requested entry of final judgment against PRS LLC so that appropriate collection efforts could be pursued. Ray submits that Bonneville is simply irrelevant to the issue at bar.

II

PRS LLC FAILED TO RAISE A GENUINE ISSUES OF MATERIAL FACT PRECLUDING THE GRANTING OF RAY'S SJ MOTION

A. The Trial Court correctly determined that PRS LLC failed to properly raise a genuine issue of material fact that would have precluded the granting of Ray's SJ Motion.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ut.R.Civ.P. 56(c). The Utah Supreme Court has noted the standard of review on a motion for summary judgment is as follows:

(Utah 1943) (holding oral agreement to extend lease is subject to the statute of frauds).

> "We review the trial court's summary judgment for correctness, considering only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed. *See, e.g., Surety Underwriters v. E & C Trucking*, 2000 UT 71, ¶ 14, 10 P.3d 338. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* When we review a grant of summary judgment, "we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party." *Id.* at ¶ 15." Hermansen v. Tasulis, 2002 UT 52, ¶ 10, 48 P.3d 235.

Ray's SJ Motion was properly supported by a Memorandum of Points and Authorities and an Affidavit of Ray Hunting dated September 19, 2006 (herein "Ray's SJ Affidavit"). R. 168-179. In response, PRS LLC filed a memorandum in opposition (herein "PRS LLC's SJ Memorandum"), with a copy of the alleged lease agreement with PRS Corporation attached as Exhibit "A" thereto. PRS LLC did not submit any depositions, answers to interrogatories, admissions or affidavits in opposition to Ray's SJ Motion. R. 343. Because Ray's SJ Motion was properly supported by adequate proof, the Utah Supreme Court has consistently held that rule 56(e) of the Utah Rules of Civil Procedure precludes a party (such as PRS LLC) from opposing a Motion for Summary Judgment in reliance merely on general denials of allegations in its pleadings. Instead, the opponent (PRS LLC) has an affirmative duty to respond with admissible evidence in the form of affidavits, interrogatory answers, or deposition transcripts, in order to

substantively controvert[15] Ray's statement of facts, to-wit:

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15. Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure explicitly provides that:

> "[E]ach fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party." Id. (Emphasis supplied)

PRS LLC's SJ Memorandum was not accompanied by any affidavits, interrogatory answers or deposition transcripts and the Statement of Facts contained in Ray's Memorandum of Points and Authorities (in their entirety) were therefore deemed admitted as true and correct for the purpose of adjudicating the merits of Ray's SJ Motion. R. 342. See also, D & L Supply v. Sauriniu, 775 P.2d 420, 421 (Utah 1989); Busch Corp. v. State Farm Fire & Casualty Co., 743 P.2d 1217, 1219 (Utah 1987).

Further, Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure provides that "controverting" a movant's statement of facts means:

> "the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials." Id. (Emphasis supplied).

In Bluffdale City v. Smith, 2007 UT App 25, ¶12, 156 P.3d 175, this Court recently upheld a trial court's award of summary judgment where the opposing party failed to comply with Rule 7 Ut.R.Civ.P. as follows:

> "Defendants' opposing memorandum fails to substantially comply with rule 7(c)(3)(B) of the Utah Rules of Civil Procedure. Defendants' failure amounts to more than a technical violation of the rule. Defendants do not provide an explanation of the basis for any dispute, nor do they provide appropriate supporting citations. Rather, Defendants' opposing memorandum contains only a separate statement of additional facts and a list of facts deemed disputed without further explanation or support. As a result, Defendants' opposing memorandum does not controvert each of Plaintiff's facts. Therefore, we conclude that the district court did not abuse its discretion when it enforced rule 7(c)(3)(B) by deeming Plaintiff's facts to be admitted. We affirm the district court's order granting summary judgment." Id.

Although the Trial Court did not have the benefit of the Bluffdale City decision when it issued its SJ Ruling or Reconsideration Ruling on February 1, 2007, the same provides further supporting grounds to affirm the Trial Court's SJ Ruling.

> "When a motion for summary judgment is filed and supported by an affidavit, the party opposing the motion has an affirmative duty to respond with affidavits or other materials allowed by rule 56(e).
> [A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
> Utah R.Civ.P. 56(e); *see Hall v. Fitzgerald*, 671 P.2d 224, 226-27 (Utah 1983); *Thorncock v. Cook*, 604 P.2d 934, 936 (Utah 1979)." D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989) (Emphasis supplied).

The Utah Supreme Court has further held that the trial court may properly conclude there are no genuine issues of material fact where the opposing party (PRS LLC) fails to file any responsive affidavit(s) or other admissible evidence:

> "The language of this rule [56(e)] is clear. Indeed, we have previously held: [W]hen a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Rule 56(e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existing of such an issue. Without such a showing, the Court need only decide whether, on the basis of the applicable law, the moving party is entitled to judgment." Busch Corp. v. State Farm Fire & Casualty Co., 743 P.2d 1217, 1219 (Utah 1987). (Emphasis supplied).

Although PRS LLC would now like to belatedly attempt to dispute Ray's statements of fact,[16] PRS LLC's unsupported and conclusory statements are not supported

16. Id. Further, not only did PRS LLC's SJ Memorandum fail to restate any of Ray's statements of fact, it was also wholly unsupported by any admissible evidence, i.e. affidavits, depositions, or interrogatory answers.

by citation to any affidavit(s), record evidence or deposition testimony, whatsoever.[17] Accordingly, Ray's Statement of Facts were properly deemed admitted for the purposes of determining Ray's SJ Motion.

Notwithstanding PRS LLC's protestations to the contrary, the Trial Court did consider the alleged lease agreement with PRS Corporation incident to granting and affirming Ray's SJ Motion and properly ruled that it was insufficient to create a genuine issue of material fact. R. 342. Under Holmes Development, the Trial Court correctly ruled that PRS LLC is not a party to that alleged lease agreement and PRS LLC is therefore not entitled to the benefit of the same. Whether there may, or may not, be an enforceable lease agreement with PRS Corporation does not create a material issue of fact[18] in this case because PRS LLC is not entitled to the benefit of a third party's contract.[19] See, Holmes Development at ¶53. In PRS LLC's Brief, it "claims only to be a

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17. See, Walker v. Rocky Mountain Recreation Corp., 508 P.2d 538, 542 (Utah 1973) (conclusory statements unsupported by facts are inadmissible in considering a motion for summary judgment); Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985).

18. See, Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983) (Although facts before the court are considered in favor of the party opposing summary judgment, an issue of fact must be material to the dispute at issue to preclude summary judgment).

19. PRS LLC's SJ Memorandum argued that PRS LLC was a party to the alleged lease agreement and that it was entitled to the rights and benefits of the alleged lease agreement. R. 275. It was not until after the Court's SJ Ruling and in PRS LLC's Motion for Reconsideration that PRS LLC changed its position and tried to argue that PRS LLC was entitled to the rights and benefits of the alleged lease agreement and that PRS LLC's use and occupation of the Property was subject to PRS Corporation's alleged lease agreement. R. 385-386.

temporary third party beneficiary" of an allegedly enforceable lease[20] regarding the Property.[21] However, PRS LLC, not PRS Corporation, has at all times relevant herein paid the only (partial) rent that Ray received for the Property.[22]

Furthermore, the Trial Court is only required to consider fair inferences from the facts in support of the party opposing summary judgment:

> ". . . [R]eciting all facts and fair inferences drawn from the record in the light most favorable to the nonmoving party. Nevertheless, where the movant supports a motion for summary judgment with affidavits or other sworn evidence, the nonmoving party may not rely

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20. One of the fatal flaws to PRS LLC's argument is that the alleged Lessee (PRS Corporation) did not make any rental payments for over two (2) years and therefore abandoned the alleged lease. Thus, even if PRS LLC is/was a "temporary third party beneficiary," it would be unable to assert any rights under the alleged lease. This is particularly true in light of the fact that PRS Corporation has had knowledge (through its agent – William L. Lauf) of the proceedings below but did not make any efforts to intervene. See, In Re Discipline of Alex, 2004 UT 81, ¶ 99 P.3d 865, 870 (holding a landlord with a contingent interest in attorney/tenant's property is permitted under rule 24 Ut.R.Civ.Pro. upon timely application to intervene in an action – including a disciplinary action).

21. Significantly, PRS LLC's Answer to Ray's Amended Complaint does not allege that there is an enforceable written lease agreement between the parties. Nor does PRS LLC's Answer assert the alleged lease agreement as constituting an affirmative defense to Ray's Amended Complaint. R. 70-73. Rules 8(c) and 12(h) of the Ut.R.Civ.Pro., require all affirmative defenses (including any that constitute an avoidance) to be asserted in the answer or the defense is deemed waived. In Fowler v. Seiter, 838 P.2d 675, 678 (Utah Ct.App. 1992), this Court held that although the landlord's failure to obtain the Court's endorsement on summons in a forcible entry/unlawful detainer action gave rise to an insufficiency of process defense but the tenant waived this defense when he failed to raise the defense in his Answer and his attempt to raise the defense when the landlord moved for treble damages was too late. It thus appears PRS LLC could not assert the alleged lease as an affirmative defense had this case proceeded to trial.

22. See, Ray's Amended Complaint ¶ 7, Ray's SJ Affidavit at ¶s 3, 6. R. 59-69; R. 156; R. 166; R. 178.

> on bare allegations from the pleadings to raise a dispute of fact. Accordingly, an allegation in a pleading has no effect on our view of the facts if it is controverted by depositions, answers to interrogatories, admissions on file, affidavits, other admissible evidence in the record. If a motion for summary judgment is supported by these types of evidence, in order to raise a dispute of fact, a nonmoving party must use evidence from these same types of sources." Poteet v. White, 2006 UT 63, ¶ 7, 147 P.3d 439 (Emphasis supplied).

In Poteet, the Utah Supreme Court unanimously upheld Judge Mower's grant of summary judgment where the party opposing summary judgment did not present any admissible evidence that would create a material factual dispute. The plaintiff, Greg Poteet, sued his neighbor, William White, for damage to his property and sawmill arising out of a fire that spread from White's property. Poteet alleged in his complaint that the fire was started by White's independent contractor, Rick Green. In support of White's motion for summary judgment, White provided evidence by affidavit and deposition testimony establishing that Green did not light the fire that spread to Poteet's sawmill. Justice Durrant, writing for the unanimous Utah Supreme Court, reasoned that "because the record contains no admissible evidence connecting White to the damages to Poteet's sawmill, the District Court correctly entered summary judgment against him." Id. at ¶ 1.[23]

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23. On appeal, Poteet had argued that there was a disputed issue of material fact as to whether Green set the fire based on (1) Poteet's affidavit that a third party told him that Green set the fire and (2) statements in Green's deposition where he admitted to starting two (2) fires. After closely reviewing the record, the Supreme Court decided that Poteet's affidavit was classic hearsay and therefore did not satisfy Rule 56(e) requirements. Regarding the statements admitting to starting two (2) fires in his deposition, the Supreme Court also ruled that this fact was insufficient to give rise to an inference that Green started the fire that spread to Poteet's property. The record contained evidence of at least three (3) fires, thus Green's admission to starting two (2) fires was insufficient to give

Like Poteet, PRS LLC failed to raise a material dispute of fact with admissible evidence in the record of the proceedings below. The alleged lease agreement was considered by the Trial Court in its original Ruling but the Trial Court found that it was not material or relevant because PRS LLC is not formally a party to the alleged lease agreement and Ray is not obligated to deal with PRS LLC based on any terms expressed therein. PRS LLC did not submit any affidavits or admissible evidence in opposition to Ray's SJ Motion and the Trial Court properly granted Ray's SJ Motion.

B. The Trial Court properly exercised its discretion by declining to grant PRS LLC's Motion to Reconsider.

After the Trial Court granted Ray's SJ Motion, PRS LLC filed a Motion to Reconsider supported by an Affidavit of William Lauf dated November 14, 2006 (herein "Lauf Reconsideration Affidavit"). The standard of review on appeal of a Trial Court's grant of summary judgment is correction of error with no deference given to the Trial Court's ruling. See, Gerbich v. Numed, Inc., 977 P.2d 1205, 1207 (Utah 1999). However, a Trial Court's consideration of a motion to reconsider summary judgment is reviewed under the abuse of discretion standard, which grants deference to the Trial Court and should only be reversed if the ruling is "so unreasonable that it can be classified as arbitrary and capricious or a clear abuse of discretion." See, Timm v. Dewsnup, 921 P.2d 1382, 1386 (Utah 1996); Trembly v. Mrs. Fields Cookies, 884 P.2d

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rise to an inference that one (1) of the two (2) fires was the fire that damaged Poteet's sawmill. Thus, the Trial Court is permitted to take a close look at the record evidence and determine whether any evidence creates a disputed issue of material fact, without being required to make any credibility determinations.

1306, 1312 (Utah Ct. App. 1994) (review of Rule 54(b) motion is within the sound discretion of the Trial Court, and will be reviewed for abuse of discretion).

In Trembly, Judge Davis identified six (6) factors the Court may consider in determining a Rule 54(b) motion for reconsideration:

> "A court can consider several factors in determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when (1) the matter is presented in a "different light" or under "different circumstances;" (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately brief when first contemplated by the court. *State v. O'Neil*, 848 P.2d 694, 694 n. 2 (Utah App.), *cert denied*, 859 P.2d 585 (Utah 1993). Trembly v. Mrs. Fields Cookies, at 1311.[24]

In PRS LLC's Appeal Brief, it does not identify any of the six (6) Trembly factors or argue how the Trial Court erred in its exercise of discretion. The only factor that PRS LLC potentially argued in its Appeal Brief is "new evidence" in the form of Lauf's Reconsideration Affidavit.[25] However, upon review of PRS LLC's Reconsideration

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24. Neither PRS LLC's Motion to Reconsider nor PRS LLC's supporting Memorandum identified the first three (3) Trembly factors in support of its request for reconsideration. R. 369-388. In PRS LLC's Motion to Reconsider, PRS LLC premised its request on factor 4 (manifest injustice) and factor 5 (court needs to correct its errors). R. 387. Although PRS LLC's Memorandum also identified factor 6 (issues inadequately briefed) as a basis for relief, PRS LLC presented no substantive argument on this factor in its Memorandum below. Id.

25. Lauf's Reconsideration Affidavit is contradictory to Mr. Lauf's prior deposition testimony and should be disregarded by the Court under the "sham affidavit rule." See, Webster v. Sill, 675 P.2d 1170, 1172-1173 (Utah 1983) ("the purpose of summary judgment is not to weigh the evidence. But when a party takes a clear position in a

Motion. Memorandum and Lauf's Reconsideration Affidavit. the Trial Court properly exercised its discretion and declined to reconsider its SJ Ruling in light of PRS LLC's failure to demonstrate any entitlement to relief under the Trembly factors.

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deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy"); Floyd v. Western Surgical Associates, Inc., 773 P.2d 401, 403 (Utah Ct.App. 1989). For example:

> 1. In Lauf's deposition, he testified that the only agreement between Pipe Renewal Service, Inc. [PRS Corporation] and Pipe Renewal Service, LLC [PRS LLC] was an equipment lease from PRS Corporation to the Defendant Pipe Renewal, LLC (Lauf Deposition p. 27-29) R. 411-413. In Lauf's Affidavit, he **later** claimed that there is an agreement between PRS Corporation and PRS LLC authorizing PRS LLC to occupy and use the leased premises. (Lauf Reconsideration Affidavit at ¶ 7). R. 377.
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> 2. In Lauf's deposition, he testified that he orally assigned the alleged lease with PRS Corporation to PRS LLC. (Lauf Deposition p. 68 – 69) R. 411-413. However, in his affidavit, Lauf **later** stated that PRS Corporation is the lessee, and PRS LLC occupies the premises with the agreement and authority of PRS Corporation. (Lauf Reconsideration Affidavit ¶ 2 and 7). R. 376-377.
>
> 3. In Lauf's deposition, he testified that the only asset of PRS Corporation was the equipment leases. (Lauf Deposition p. 25 - 26) R. 414-415. Lauf further testified that all of the receipts for service performed in 2006 were deposited in PRS LLC's account not PRS Corporation. Id. In his affidavit, Lauf **later** stated that PRS Corporation maintains ownership of all assets and the LLC only operates the business. (Lauf Reconsideration Affidavit ¶ 6). R. 377.

Lauf's Reconsideration Affidavit thus appears to be a sham that did not create a basis for the Trial Court to exercise its discretion or to reverse its correct Ruling and the Trial Court properly declined PRS LLC's invitation to do so. Ray submits this Court should likewise disregard Lauf's Reconsideration Affidavit as a basis to create an issue of disputed fact.

III

THE TRIAL COURT PROPERLY AWARDED RAY HIS UNPAID INCREASED RENT AS DAMAGES PROVIDED BY THE UNLAWFUL DETAINER STATUTE

A. The Trial Court properly awarded Ray his unpaid rent as damages provided by the Unlawful Detainer Statute.

Utah law clearly provides for damages upon determining a tenant is in unlawful detainer in the form of unpaid rent and treble damages:

> "**U.C.A. § 78-36-10. Judgment for restitution, damages, and rent – Immediate enforcement – Treble damages.**
> (2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:
> (a) forcible entry;
> (b) forcible or unlawful detainer;
> (c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;
> (d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent; and
> (e) the abatement of the nuisance by eviction as provided in Sections 78-38-9 through 78-38-16.
> (3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c),[26] and for reasonable

26. The Unlawful Detainer Statute was amended by the Utah Legislature in 2007 and again in 2008. The relevant changes include (1) the "lease signer" as a party defendant changes in § 78-36-7 previously addressed at footnote 8 at p. 16 hereinabove, and (2) changes regarding attorney's fees in § 78-36-10, identified as follows:

> "**78-36-10. Judgment for restitution, damages, and rent – Immediate enforcement – Treble damages.**
> (1)(a) A judgment may be entered upon the merits or upon default.
> (b) A judgment entered in favor of the plaintiff shall include an order for the restitution of the premises as provided in Section 78-36-10.5.
> (c) If the proceeding is for unlawful detainer after neglect or failure to perform any condition or covenant of the lease or agreement under which the property is held, or after default in the payment of rent, the

attorneys' fees, if they are provided for in the lease or agreement." (1994) (Emphasis supplied).

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judgment shall also declare the forfeiture of the lease or agreement.

(d) (i) A forfeiture under Subsection (1)(c) does not release a defendant from any obligation for payments on a lease for the remainder of the lease's term.

(ii) Subsection (1)(d)(i) does not change any obligation on either party to mitigate damages.

(2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default shall also assess the damages resulting to the plaintiff from any of the following:

(a) forcible entry;

(b) forcible or unlawful detainer;

(c) waster of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;

(d) the [~~amount of rent~~] amounts due under the contract, if the alleged unlawful detainer is after default in the [~~payment of rent~~] payment of amounts due under the contract; and

(e) the abatement of the nuisance by eviction as provided in Sections 78-38-9 through 78-38-16.

(3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through [~~(e)~~] (e) and for reasonable [~~attorneys'~~] attorney fees[~~,if they are provided for in the lease or agreement~~].

(4)(a) If the proceeding is for unlawful detainer, execution upon the judgment shall be issued immediately after the entry of the judgment.

(b) In all cases, the judgment may be issued and enforced immediately." Utah Code Ann. § 78-36-10 (2007) (2007 amendment identified by underlining and strikethroughs)

In the 2007 amendments, at subsection (2)(d), the Legislature clarified that both rent and "any amounts due" after unlawful detainer constitute damages under subsection (d) clarifying its intent that trebled damages are to include damages identified in section 2(a) through (e). Finally, the Legislature broadened the Trial Court's authority to award reasonable attorney's fees in the absence of a written lease agreement by providing for attorney's fees. Since the 2007 amendments were not in effect at the time of this Unlawful Detainer action, the substantive amendments, including attorney's fees under § 78-36-10(3) as well as the party defendant changes under § 78-36-7 do not apply in the case at bar. To the extent that PRS LLC's Appeal Brief relies upon the subsequent statutory enacments, Ray respectfully submits this Court should disregard the same.

In the Trial Court's SJ Ruling dated November 1, 2006, and Reconsideration Ruling dated February 1, 2007, the Trial Court properly determined that PRS LLC was in unlawful detainer of the Property. It is undisputed that PRS LLC has, subsequent to the Court's SJ Ruling, vacated the property.[27] R. 664; R. 821. Contrary to PRS LLC's assertions, there is no statutory or case law[28] requirement that an order of restitution is a necessary prerequisite to the entry of damages[29] for unlawful detainer. Ray respectfully

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27. PRS LLC could have certainly mitigated its damages by complying with the Three Day Notice and immediately vacated the premises. However, PRS LLC chose to sit back and let the damages accrue, knowing the risk of treble damages. Thus, PRS LLC should not now be heard to complain about the amount of trebled damages. Furthermore, the Unlawful Detainer Statute provides the landlord with the optional remedy to post a possession bond and obtain immediate occupancy of the premises so long as the tenant does not file a counter bond. See, Utah Code Ann. § 78-36-8.5 (1987). However, the possession bond process is permissive and not mandatory because the Legislature used the permissive language "may" as opposed to the mandatory "shall." Id.; See also, State v. Gallegos, 967 P.2d 973, 978 (Utah Ct.App. 1998) (It is a general rule of statutory constitution that the legislative use of the word "may" is permissive). Had the Legislature been concerned with the accrual of damages during litigation, it certainly could have placed a cap on the amount of treble damages, or made the posting of a possession bond mandatory, but it chose not to do so. The 2007 Legislative amendments also support Ray's position on these issues.

28. Id. PRS LLC cites no case law from our Utah Appellate Courts to support its arguments on this issue.

29. The "rent" vs. "damages" dichotomy relied on by PRS LLC is irrelevant to the case at bar. The statutory distinction between "rent" and "damages" for the purposes of an unlawful detainer action that "rent" constitutes rent which accrues before termination of the tenancy, and "damages" include, in part, rent which accrues after the tenancy has been terminated by the Three Day Notice required by statute. See, Monroc, Inc. v. Sidwell, 770 P.2d 1022, 1025-1026 (Utah Ct.App. 1999). Since Ray undisputedly served proper notice on PRS LLC under the Unlawful Detainer Statute (R. 165; R. 177; R. 340-343.) and all of the rent/damages sought accrued after the Three Day Notice, the entire amount of rent sought by Ray qualifies as damages which are required to be trebled under the

submits that the PRS LLC's reading of the Unlawful Detainer statute (to require an order of restitution as a prerequisite to the entry of an award for damages) would render the statute meaningless because it would preclude any landlord from obtaining damages if the tenant fought the litigation but then vacated the premises just before final judgment is rendered. See, Perrine v. Kennecott Mining Co., 911 P.2d 1290, 1292 (Utah 1996) (statutory enactments are to be construed to render all parts thereof relevant and meaningful). In essence, a tenant could "litigate and vacate" just before the trial under PRS LLC's interpretation of the Unlawful Detainer statute and occupy the premises "rent free" without having to suffer a judgment for unpaid rent accruing after service of a Three Day Notice to Pay or Vacate. The plain language of the Unlawful Detainer statute, however, provides for mandatory damages against a tenant resulting from its unlawful detainer and Ray respectfully submits that PRS LLC's strained reading of the Unlawful Detainer Statute should be rejected by this Court. See, Utah Code Ann. §78-36-10(3) (1994), cited hereinabove at pages 32-33.

Further, PRS LLC's reliance on Perkins v. Spencer, 243 P.2d 446 (Utah 1952) is misplaced. Perkins is a landmark case in Utah concerning the legal standards applicable to the vendor's forfeiture of a real estate purchase contract and the concomitant enforceability of liquidated damages provisions contained therein – an issue that is not

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statute.

Thus, under the plain language of § 78-36-10(3), a judgment for unlawful detainer shall include an award of damages including rent ($88,000.00) plus trebled damages ($264,000.00) as the rent after notice is a statutorily defined damage.

pertinent to the case at bar. Moreover, inconsistent with PRS LLC's assertion, Ray's counsel could not locate a single case that cites to Perkins for the proposition that a court should award nominal damages in an unlawful detainer action. Lastly, Perkins is factually distinguishable from the case at bar because Perkins involved a husband and wife who were both parties to a written real estate purchase contract with their vendor. In Perkins, the Utah Supreme Court noted that the parties conceded that both the husband and wife were in actual occupancy of the premises reasoning that:

> "[T]here is nothing to indicate that he had abandoned the premises, or that the marital unity of the parties had been severed. The fact appears to be the contrary...So long as he remained in possession, it is difficult to see how the Spencers could be damaged by the fact that Mrs. Perkins remained there." Id. at 474.

In the case at bar, PRS LLC is not a party to any alleged contract/written lease but claims to be a mere temporary incidental third party beneficiary of an alleged lease (R. 385) – a status that is a legal nullity under Holmes Development, LLC., ¶ 53. Finally, the record is bereft of any evidence that PRS Corporation was in actual possession of the property during the time period damages are requested.[30]

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30. Despite PRS LLC's counsel's valiant attempts to testify on PRS LLC's behalf throughout its Appeal Brief by repeatedly claiming that PRS Corporation was in actual occupation of the premises at the time of commencement of the unlawful detainer action, PRS LLC has not cited any competent evidence in the record below that the PRS Corporation was in possession of the Property at the time of the commencement of the unlawful detainer action. In fact, the only citation to the record below that PRS LLC includes is at p. 6 & 7 of its Appeal Brief to the Record at pages 382-383, 184, 252 and 872 at p. 9. The Record at 382-383 is PRS LLC's Memorandum of Points and Authorities in Support of its Motion for Reconsideration, and does not constitute competent evidence as discussed in fn. 7 at page 16 hereinabove. The Record at 184 and

252 are exhibit dividers and are irrelevant. Finally, the Record at 872, p. 9 is a portion of the transcript of the oral argument before the Trial Judge and references to PRS LLC's counsel's argument once again is insufficient to constitute competent evidence.

William L. Lauf has filed two (2) affidavits in this matter, but at no time has Mr. Lauf testified, under oath, that PRS Corporation was in actual possession of the Property during the relevant time period. Furthermore, Lauf's Reconsideration Affidavit appears to suggest that PRS Corporation was not, in fact, occupying the property, as follows:

> "8. I am confused as to the application of an eviction order against the LLC. Since the lawsuit did not name the Corporation, it seems, in the event of an order against the LLC, the Corporation could merely terminate the equipment lease and assume operatorship of the business from the LCC, thus leaving the operating business at the lease premises under the Lease Agreement (Exhibit "A") operating business as usual." Lauf's Reconsideration Affidavit. (Emphasis supplied). R. 377.

ARGUMENT ON

CROSS-APPELLANT

RAY HUNTING'S APPEAL

ARGUMENT ON CROSS-APPELLANT RAY HUNTING'S APPEAL

I
THE TRIAL COURT ERRED BY FAILING TO AWARD RAY STATUTORILY MANDATED TREBLE DAMAGES

A. Ray was entitled to treble damages under Utah Code Ann. § 78-36-10 (1994).

As previously discussed in Argument III at pages 32-37 hereinabove, upon a Trial Court's determination of unlawful detainer, Utah law provides for an award of damages in the form of unpaid rent and treble damages:

> "**U.C.A. § 78-36-10. Judgment for restitution, damaged, and rent – Immediate enforcement – Treble damages.**
> (2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:
> (a) forcible entry;
> (b) forcible or unlawful detainer;
> (c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;
> (d) the amount of rent due, if the alleged unlawful detainer is after default in the payment of rent; and
> (e) the abatement of the nuisance by eviction as provided in Sections 78-38-9 through 78-38-16.
> (3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(c), and for reasonable attorneys' fees, if they are provided for in the lease or agreement." (1994) (Emphasis supplied).

Ray properly raised PRS LLC's monthly rent from $2,000.00 to $7,500.00 per month effective September 1, 2005.[31] On September 16, 2005, having received only

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31. Under Utah law, the failure to object to a rent increase while continuing in possession constitutes an agreement to the increased rent. See, Belnap v. Fox, 251 P. 1073, 1075-6 (Utah 1926). Prior to the filing of this lawsuit, PRS LLC never responded or objected to either the Rent Increase Notice or the Three Day Notice. R. 156; R. 165-66; R. 178. See, Plaintiff's September Affidavit at ¶ 14.

partial rent in the amount of $2,000.00 from Defendant. Plaintiff caused a Three Day Notice to be served upon Defendant and Ray filed his Complaint for Eviction, Damages for Unpaid Rent, Treble Damages and Other Relief on October 19, 2005. The Trial Court determined in its SJ Ruling (November 1, 2006) and Reconsideration Ruling (February 1, 2007) that PRS LLC was in unlawful detainer of the Property and awarded Ray partial summary judgment. R. 340-343; R. 598-599. The Trial Court subsequently granted Ray's Motion for Entry of Damages, in part, by awarding Ray unpaid rent in the amount of $88,000.00 (R. 818-822; R. 840-843) calculated as follows:

Unpaid Rent Calculation

Rent at $7,500.00 per month for 16 months (September 2005 – December 2006):	$120,000.00
Less Rent Paid: $2,000.00 per month for 16 months:	$ 32,000.00
Total Unpaid Rent:	**$ 88,000.00**

However, Ray's total damages include trebled damages which are calculated as follows:

Total Damages Calculation

General Damages for Unpaid Rent:	$ 88,000.00
Treble Damages	$264,000.00
Filing Fee:	$ 155.00[32]
Sheriff's Fees (Summons & Complaint October 27, 2005):	$ 19.50
Total Damages:	**$352,174.50**[33]

B. Ray's Requested Damages are Reasonable

32. The Trial Court also awarded Ray his costs including the filing fee and sheriff's service fee. R. 818-822; R. 840-843.

33. R. 175-179; R. 611-615. See, Ray's SJ Affidavit at ¶¶ 10, 15, 16, and Ray's Damages Affidavit dated May 2, 2007 at ¶ 2-3.

Ray's Damages are calculated at a monthly rental rate of $7,500.00 per month. Ray submits that the requested $7,500.00 rental rate was below fair market rental value for the Property and is therefore reasonable. Pursuant to the Trial Court's suggestion during Oral Argument on January 30, 2007 (R. 872 at p. 33-38), Ray had an appraisal of the Property conducted by an MAI appraiser, Paul Throndsen. In Mr. Throndsen's professional opinion, he appraised the monthly fair market rental value of the Property to then be in the sum of $13,450.00 per month. See, Throndsen Affidavit at ¶ 3. R. 600-709; R. 644-645. Since Ray's damage calculations were based on less than the fair market value rental rate for the Property, Ray submits that his requested treble damages were reasonable because those damages are less than the actual damages suffered by Ray. Furthermore, PRS LLC did not present any contrary evidence, whatsoever, regarding the rental value of the Property.

Additionally, Mr. Throndsen appraised the fair market value of the Property to then be $1,600,000.00. See, Throndsen Affidavit at ¶ 3. R. 600-709; R. 644-645. Our Utah appellate courts have previously noted a "1% rule" as a baseline of the minimum fair rental value of property. The Utah Supreme Court in Utah State Road Comm'n v. Friberg, 687 P.2d 821, 839 (Utah 1984) held that:

> "As a rule of thumb, monthly rental value is deemed to be a sum equal to one percent of the market value." Id.

Then Chief Justice Ellett, dissenting in Johnson v. Carman, 572 P.2d 371, 374 (Utah 1977), again noted that 1% of the fair market value of the property is a minimum

fair rental value for property:

> "The trial court erred in its findings relative to the damages sustained by the defendant. One of the principal elements of benefits received by the purchaser in possession of land is the reasonable rental value thereof. The trial court made no finding regarding that value. The purchaser had possession of the land for some thirteen months. There is a rule of thumb, generally recognized, that the rental value of property is one percent of the value for each month's use; also, there was testimony that the reasonable rental was between $1,500 and $1,700 per month. It thus would appear that since the value was $170,000 (sale price), the rental value would be between $1,500 and $1,700 per month; and for thirteen months the rental value should be in the neighborhood of $20,000 or more. This figure should be substituted for the interest figure used by the trial court. This would decrease the loss to the purchaser by more than $5,000 as found by the trial court. The amount of purchaser's damage then should be $3,845 instead of $8,845 as found by the court. This damage is only 2.2% of the total sales price.
>
> In the case of Carlson v. Hamilton a defaulting purchaser sued to recover his excess payments which amounted to 9 ½ % of the purchase price. This court refused to allow recovery on the ground that a loss of 9 ½% was not enough to be shocking to the conscience. If 9 ½ % is not shocking, how can 2.2% be considered so? The Plaintiff's standing to bring the action was neither raised nor considered in that case." Id. Chief Justice Ellett in dissent (emphasis supplied).

The Property is valued at $1,600,000.00, thus based on the 1% rule, the minimum fair market rental value of the Property is arguably $16,000.00 per month. Since the monthly fair market rental value of the Property is in the $13,450.00 to $16,000.00 range, Ray's requested treble damages were reasonable in all respects and the Trial Court erred by not awarding Ray's requested treble damages.

C. The Unlawful Detainer Statute Mandates Trebled Damages be awarded in this case.

In the Court's Final Order, it denied Ray's request for trebled damages on the basis that Ray's damages were limited by the increased rental amount because a third party might arguably have a right to possession of the Property. The Trial Court's refusal to award treble damages is, however contrary to the clear and unambiguous language of the Unlawful Detainer Statute. In Aris Vision Institute, Inc. v. Wasatch Property Management, Inc., 2006 UT 45, ¶ 11-13 143 P.3d 278, the Utah Supreme Court held that trebled damages are mandatory once unlawful detainer of the premises is established. See also, Fowler v. Seiter, 838 P.2d 675, 678-9 (Utah Ct.App. 1992) (reversing trial court's denial of trebled damages in unlawful detainer action, holding trebled damages under § 78-36-10(3) were mandatory), citing Forrester v. Cook, 292 P. 206, 214 (1930) (holding that it is "mandatory upon the Court to render judgment for three (3) times the amount of damages"); Monroc, Inc. v. Sidwell, 770 P.2d 1022, 1025-6 (Utah Ct.App. 1989) (holding trebled damages under § 78-36-10 were mandatory). The Utah Supreme Court in Forrester v. Cook, 292 P. 208, 214 (Utah 1930) held that the rental value during the unlawful detainer period is the minimum amount of damages that shall be trebled.[34] Ray

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34. PRS LLC's reliance on Forrester for the purpose that only nominal damages should be awarded is misplaced. See, PRS Appeal Brief at p. 20. The Utah Supreme Court in Forrester upheld the award of damages noting the rule that:

> "Manifestly, the loss of the use of the premises-in other words, the loss of the rental value-is a damage suffered by the person from whom the property is unlawfully detained. The authorities generally so announce the rule.

submits this Court should reverse the Trial Court's Final Order and remand with directions for entry of Judgment in favor of Ray and against PRS LLC in the sum of $352.174.50 as sought by Ray below.

D. Prior to the 2007 amendment there was no requirement that any contracting party be named as a defendant in an unlawful detainer action.

Prior to the 2007 Legislative amendments discussed hereinabove, our Utah Appellate Courts have consistently held that a contracting party was not required to be named as a party defendant in an unlawful detainer action unless he/she was in actual occupation of the property at the time of commencement of the unlawful detainer action. The first case is Pearce v. Shurtz, 270 P.2d 442, 443 (Utah 1954). In Pearce, the original contracting parties were Ivan Call who sold a ranch to Frank Lewellen. Mr. Call exchanged a bond for a deed and a promissory note. Mr. Call sold his interest to Mr. Pearce and Mr. Lewellen sold his interest to Mr. Shurtz. Mr. Shurtz then transferred one-half (½) of his interest of his interest to Mr. Wright and Mr. Wright sold his one-half (½) and Mr. Shurtz sold his other one-half (½) to Mr. Johnson, leaving Mr. Johnson with the entire interest that was originally Mr. Lewellen's sole interest in the property. Mr.

Thus, in 26 C. J. 863, section 136, where the cases will be found collected, the rule is stated in this language:

> "'Where under the statute damages are recoverable, the value of the rents and profits of the land is an element of damage which is generally to be taken into consideration, without regard to the nature or extent of the right or title by which possession was held, and according to some decisions this is the measure of damages.'"

To the same effect are Flournoy v. Everett, 51 Cal. App. 406, 196 P. 916; Pfitzer v. Candeias, 53 Cal. App. 737, 200 P. 839." Id at 212.

Johnson then defaulted on the promissory note and became a tenant at will. Mr. Pearce sued and brought an unlawful detainer action against Messers. Shurtz. Wright, and Johnson but did not include the original contracting party Mr. Lewellen. The Utah Supreme Court ruled that the failure to give notice or make demand upon Mr. Lewellen, the original contracting party, did not make the unlawful detainer action premature reasoning as follows:

> "Appellant contends that since Lewellen was the only person liable on the promissory note demand for payment should have been upon him. That he should have been notified of the forfeiture for default, and that he should have been joined as party defendant in a suit for possession based on the forfeiture. This contention might be sound if the action were other than unlawful detainer. Unlawful detainer, however, is an action to remove a tenant from possession and is primarily against the person in possession. It is not similar to a quiet title action wherein anyone with any interest should be joined. Neither is it similar to an action upon the promissory note. Title 1044-60-7, U.C.A., 1943 provides:
>
> > No person other than the tenant of the premises, and subtenant if there is one in the actual occupation of the premises when the action is commenced, need be made party defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made a party defendant;***'
>
> This provision is indicative of the nature of the unlawful detainer action and of the fact that failure to serve demand or notice upon Lewellen in this case did not result in the action being premature." Id.

The Utah Supreme Court addressed the issue of necessary parties in unlawful detainer action again in the case of Tanner v. Lawler, 305 P.2d 882 (Utah 1957). Earl Tanner defaulted on his mortgage, there was a foreclosure action and Mr. Tanner

thereafter exercised his right of redemption. Walter Reichert purchased the property at the Sheriff's sale and sublet the property to W.C. Lawler and his wife Laura Lawler. When Mr. Tanner redeemed the property he brought an action against the tenants in possession, the Lawlers, because they did not have a contract to rent the property from him and they were occupants on a month-to-month tenancy. Mr. Reichert intervened in the unlawful detainer action and, even though Mr. Reichert had not been served with a notice to quit, because he had appeared in the proceeding and the Lawlers had been properly served under the statute, and the Trial Court properly evicted the Lawlers awarded treble damages against both the Lawlers and Mr. Reichert. The Supreme Court upheld the Trial Court's award of treble damages, reasoning that based on the plain language of the statute:

> "By the terms 'when it appears that any of the parties appearing in the proceedings are guilty, judgment must be rendered against them' the statute indicated that a person appearing in this kind of a case and asserting that the actual occupant is rightfully in possession as his tenant will be subject to a personal judgment against him for treble damages if the court decides his claim is invalid." Id. at 887 (fn omitted).[35]

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35. Importantly, the Unlawful Detainer statute in 1957 had one word change different from what it was in 2005. In 1957 the statute provided that:

> "nor shall any proceeding abate...but when it appears that any of the party served with process or appearing in the proceedings are guilty judgment *must* be rendered judgment must be rendered against them..." (emphasis supplied)

In the 1957 version of the statute, the statute provided that no other person other than the tenant, and a subtenant if there is one in actual occupation of the premises "need" be made a party, wherein the 2005 version provides that no other person then the tenant

In the third case Pickney v. Snidmen, 2000 UT App 275 (unpublished memorandum decision) cites to the Pearce v. Shurtz case suggesting that it is still good law. In Pickney, Joe Pickney purchased a parcel of property that had been foreclosed upon and sued the person who was occupying the premises. The Trial Court dismissed the unlawful detainer action finding that Snidmen was not the real party in interest but the Court of Appeals reversed and held that in an unlawful detainer action the appropriate party to be sued in and unlawful detainer action is the person who is occupying the premises.

The Utah Supreme Court has consistently held that in unlawful detainer actions the appropriate party to be sued is the tenant in possession. Ray respectfully submits the Court should enter an order awarding Ray trebled damages in the amount of $264,000.00.

II

THE TRIAL COURT ERRED BY DECLINING TO GRANT RAY'S SJ MOTION ON THE DAMAGE ISSUE ABSENT THE PRESENTATION OF ANY FACTUAL DISPUTE BY PRS LLC

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and subtenant if there is one in possession "shall" be made a party to defendant in the proceeding. By using the word shall, the Legislature made it mandatory as to who the parties defendant would be. PRS LLC's argument about whether or not the Rule 19 of the Rules of Civil Procedure applies, dovetails with the statutes in whether or not there are indispensable parties. The Tanner Court rejected PRS LLC's position because the statute explicitly provided that Ray as the landlord did not need to make anybody else a party defendant. The Legislature in the 2005 Unlawful Detainer statute went one step further by providing that only the identified parties who are in actual occupation of the property are the ones who will be subject to an unlawful detainer action.

On November 1, 2006, the Trial Court entered its SJ Ruling granting Ray's SJ Motion, in part, and determining that PRS LLC was in unlawful detainer of the Property but, sua sponte, reserving the amount of damages for further hearing. R. 340-343; R. 646. On February 1, 2007, the Trial Court entered its Ruling and Order denying Defendant's Motion for Reconsideration, and affirming its prior Summary Judgment Ruling, but again reserving the issue of damages for future hearing. R. 594-599; R. 645.

At no stage in the proceedings below did PRS LLC present any competent evidence or legal arguments that Ray's requested damages were excessive or unwarranted. In fact, had the Trial Court awarded Ray his requested damages in the Court's November 1, 2006, Summary Judgment Order, PRS LLC would not have been permitted to continue to drag out the litigation for an additional eight (8) months with its Motion for Reconsideration.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Ray respectfully requests that this Court affirm the Trial Court's decision awarding summary judgment in Ray's favor and against PRS LLC, determining that PRS LLC was in unlawful detainer of the premises, and awarding Ray $88,000.00 in damages for rent. This Court should, however, reverse the Trial Court's order denying trebled damages and remand for entry of an additional judgment in Ray's favor for trebled damages in the

amount of $264.000.00. Unless this Court intends to grant Ray the full relief he seeks herein. Ray respectfully requests that this Court schedule oral argument on this matter.

DATED this 21st day of April, 2008.

Respectfully submitted,

Carey Seager

Phillip W. Dyer, Esq.
Carey A. Seager, Esq.
Attorneys for Appellee and Cross-Appellant Ray Hunting

M:\E \client\Hunting\Brief of Appellant

CERTIFICATE OF MAILING

STATE OF UTAH)
)ss.
COUNTY OF SALT LAKE)

Carey A. Seager, being duly sworn, deposes and says:

That she served the **BRIEF OF APPELLEE AND CROSS-APPELLANT RAY HUNTING** upon the following parties by placing two (2) true and correct copies thereof in an envelope addressed to:

Daniel S. Sam, Esq.
William L. Reynolds, Esq.
SAM & REYNOLDS, PLLC
319 West 100 South, Suite A
Vernal, Utah 84078

and mailing the same, sealed, with first class postage prepaid thereon, in the United States Mail at Salt Lake City, Utah, on the 21st day of April, 2008.

Carey Seager

SUBSCRIBED AND SWORN to before me this 21st day of April, 2008.

My Commission expires:
2-15-2012

Notary Public
Residing at: Salt Lake County, UT

Notary Public
M DYER
Keams Bldg.
84101
Expires
15, 2012
State of Utah